CASES AND MATERIALS
ON THE LAW
OF TORTS
EXPERIMENTAL EDITION
PART II

E.R. Alexander

J.B. Dunlop

Faculty of Law

University of Toronto

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CHAPTER V: THE TEST OF FAULT: OBJECTIVE OR SUBJECTIVE? HEREIN OF THE STANDARD OF CARE IN NEGLIGENCE

We saw in Section 3 of Chapter I that in most tort actions today before a defendant will be liable to a plaintiff he must have been at "fault" in the sense that he must have intended the plaintiff's injury or have been negligent with respect to it. In the chapters dealing with intentional interferences with the person and property we explored, among other matters, the meaning of intention and how it differs from motive. However, the emphasis in those chapters was more on the constituent elements of the various intentional torts and the nature of the interests being interferred with than it was on the nature of the defendant's conduct.

In Chapter V we are primarily concerned with the nature of the defendant's conduct and whether it can be characterized as fault. Here we are concerned with how fault is determined. Is the test of fault objective or subjective? In determining whether the defendant was at fault in either intentionally or negligently injuring the plaintiff do we look only at what the defendant did or are we also interested in his state of mind at the time he did it?

The first group of cases in this Chapter is concerned with the tort liability of lunatics and children. As we shall see, many courts apply a more or less subjective test in determining the capacity of those suffering such disabilities to injure others either intentionally or negligently. The remaining cases in the Chapter are concerned with the more or less objective test applied in negligence actions to all those not suffering from lunacy or infancy, a test based on the reasonable man of ordinary prudence.

In this Chapter we begin the study of negligence as a basis of tort liability, and, as Fleming says (Law of Torts, 6th ed. 1983, at p.98); "it is important to grasp at the outset that negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable in a given community. The subjective notion of personal 'fault' has long been discarded in favour of the stricter, impersonal standard of how a reasonable man would have acted in the circumstances. In this manner, while retaining a verbal link with the moral criterion of fault, the admonitory function of the principle has been largely overshadowed for the sake of compensating accident victims, regardless of the 'wrongdoer's' subjective blameworthiness." (footnotes omitted). And the same author adds at the beginning of his chapter on the standard of care in negligence (id. at p. 101): "Negligence is conduct falling below the standard demanded for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do in the circumstances. The behaviour of individuals is so incalculable in its variety, and the possible combinations of circumstances giving rise to a negligence issue so infinite, that it has been found undesirable, if not impossible, to formulate precise rules of conduct for all conceivable situations. In order to ensure a high degree of individualization in the handling of negligence cases, the law has adopted an abstract formula, that of the reasonable man, and has left to the jury, or to a judge in their stead, the task of concretizing and applying that standard in individual cases." (footnote omitted).

VAUGHAN v. MENLOVE

Common Pleas. 1837 132 E.R. 490

... At the trial it appeared that the rick in question had been made by the Defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire: that though there were conflicting opinions on the subject, yet during a period of five weeks, the Defendant was repeatedly warned of his [471] peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the Defendant's barn and stables, and thence to the Plaintiff's cottages, which were entirely destroyed.

CHAPTER VI

AN ANATOMY OF NEGLIGENCE: RISK TO WHOM? AND RISK OF WHAT?

In Chapter V we saw that negligence involves the creation of unreasonable risks of harm. And we saw that, lunatics and children aside, in determining whether a particular defendant was negligent, i.e., had created unreasonable risks of harm, the court applies a more or less objective test: it compares what the defendant did with what a reasonable man would have done in the same circumstances.

The basic problem in negligence lititation is one of limitation of liability. As Fleming says (Law of Torts, 6th ed. 1983, at pp. 98-9): "Some interests are protected against negligent interference, others are not. However welfare-minded, we are still far from exacting tort compensation for every kind of harm caused to anyone by conduct fraught with risk of some injury. Negligence is a matter of risk, i.e., of recognizable danger of harm. This immediately raises the question 'Risk to whom?' and 'Risk of what?' For the purpose of dealing with these questions, the courts have evolved a number of artificial techniques, like 'duty of care' and 'remoteness of damage', which are concerned with the basic problems of what harms are included within the scope of the unreasonable risk created by the defendant, and what interests the law deems worthy of protection against negligent interference in consonance with current notions of policy. Since the definition of tortious negligence does not furnish any clue to its conditions of actionability beyond a mere reference to the nature of the defendant's conduct, these ancilliary mechanisms assume a vital importance in delimiting the scope of legal protection against inadvertent harm."

In this chapter we will examine these artificial techniques for limiting liability in negligence. They do not themselves furnish reasons for particular results. They merely furnish ways of stating results. When the courts are dealing with the question of 'Risk to whom?' they normally talk 'duty of care'. When they are dealing with the question of 'Risk of what?' they normally talk 'remoteness of damage' or 'proximate cause'.

Since negligence is a matter of risk--of recognizable danger of harm resulting from the defendant's conduct--foreseeability of harm plays an important role in deciding whether the defendant was negligent. Not determinative, because the risk, although foreseeable, may be very small (Bolton v. Stone, supra, p.448) and any utility in the defendant's conduct has to be balanced against the harm risked (Priestman v. Colangelo, supra, p.454) in deciding whether the risks were unreasonable, i.e., in deciding whether the defendant was negligent.

And foreseeability of harm also plays an important role in answering the questions of 'Risk to whom?' and 'Risk of what?'. Again not determinative, because considerations of policy may dictate a finding

of 'no duty' or 'no proximate cause' despite a finding of foreseeability of harm to a particular person or of a particular kind. And conversely, despite a finding of unforeseeability, policy may dictate a finding of 'duty' or 'proximate cause'. In recent years the courts, particularly the English courts, often have been prepared to articulate their policy considerations. And this has been especially true when the plaintiff is complaining of a negligent interference, not with his physical person or tangible property, but with an economic interest. Some of the cases towards the end of the chapter raise the distinction between tangible property and economic interests. In a later chapter we will deal with the special problem of negligent misrepresentation (normally involving words as opposed to action) and economic interests, where considerations of policy are crucial. The cases in this chapter involve negligent action, as opposed to negligent words, although in some of them there is an element of misrepresentation.

This chapter contains some of the best known, and most difficult, cases in the common law world of torts.

WINTERBOTTOM v. WRIGHT
Court of Exchequer. 1842 152 E.R. 402

Case. The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also, not on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and [110] his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, and infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life. * * *

Byles, for the defendant, objected that the declaration was bad in substance. This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that [111] wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue: *Tollit* v. *Sherstone* (5 M. & W. 283). If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences

CHAPTER VII

CAUSATION: A MATTER OF FACT OR A MATTER OF LAW?

The statement that the defendant in a case did not "cause" the plaintiff's injury and therefore ought not to be required to compensate him for it seems simple and straight-forward enough. Through the magic of the common law, however, it has been rendered both complex and deceptive.

It is a story with which you will be familiar. The same language is used to express two quite distinct ideas. To say that the defendant in a case did not "cause" the plaintiff's injury may mean that what the defendant did was of no significance in bringing about the damage. That is a meaning you would have anticipated. But it may mean that, notwithstanding the defendant's conduct was a factor in bringing about the injury, defendant ought not to be held legally responsible because the conduct does not seem blameworthy or, there was other conduct contributing to the injury which seems more blameworthy. That is a meaning which you might not have anticipated.

Why would the same language be used to express these two ideas? The problem is that the concepts, though distinct, are related. Conduct causes harm. Negligence describes conduct of a certain type. Since only conduct of this type results in liability there is a tendency to skip a stage in the reasoning. Instead of asking whether the plaintiff's harm was caused by the defendant's conduct and then proceeding to ask whether the conduct could be considered negligent, the tendency is to ask whether the plaintiff's harm was caused by the defendant's negligence. Once one thinks in terms of negligence "causing" harm it is easy to equate the absence of negligence with the absence of cause. And this is what courts and counsel (not necessarily in that order) have done countless times and will probably continue to do as long as negligence remains the principal theory of liability. In a word, then, the same language is used to express two ideas because frequently there has been a failure to realize that they were two ideas.

In some of the more scholarly judgments and some of the scholarly writing the two concepts are distinguished by the labels "cause in fact" and "legal cause". But while this indicates that the particular judges and the particular scholars have not been confused, it does not really suggest workable terminology for general use because the labels are sufficiently congruent to contain the seeds of continuing confusion.

The cases in this chapter illustrate the two concepts in a variety of forms, as well as the confusion.

CHAPTER VIII: PROOF OF NEGLIGENCE: RES IPSA LOQUITUR

Note on the Trial Process

A civil action is a formal procedure for settling a dispute between or among the parties. Unable to resolve their disagreement by negotiation, one of them has invoked the assistance of the Court. Generally, the assistance of the Court is sought by the party who wishes to bring about a change in the status quo. In a tort action this usually means that someone has suffered a loss and wishes the Court to change the status quo by shifting that loss to someone else through the medium of a damage award, although sometimes he may be seeking an order against the continuation of the status quo by requiring damaging conduct to be stopped.

The dispute among the parties may involve one or more of three elements. It may be as to the facts: the events that transpired involving the parties. It may be as to the law: the rule that governs the type of situation disclosed by the facts. Or it may be as to the application of the law: the way in which the governing rule should be brought to bear on the particular facts. Most cases that go to trial are primarily disputes of fact. The trial is primarily a fact-finding process. The parties seek by evidence to establish what events have transpired, and frequently, when the fact determinations have been made, the law and its application fall fairly readily into place. It is probably fair to say that only in a minority of trial cases is there a serious dispute as to the law or its application. In appellate courts the situation is reversed. Appeal courts are reluctant to interfere with trial courts on questions of fact, especially where the credibility of witnesses is involved, since there is thought to be some advantage in seeing and hearing the witnesses as they testify. On the other hand, appeal courts are more authoritative on legal questions. Consequently the only appeals really worth taking, and most appeals actually taken, involve questions of law.

This chapter is concerned with the proof of facts at a trial; facts which in the plaintiff's case disclose a cause of action, facts which in the defendant's case negate a cause of action or disclose a defence. But where one is proving facts, even though there is no dispute of law, the law plays an important role because it determines what facts are significant. In a battery case, for example, the legal definition of battery dictates that plaintiff will try to prove, and defendant will try to deny, that the latter intentionally struck the former a physical blow. Or, alternatively, the definition of self-defence will dictate that the defendant try to prove he was being attacked by the plaintiff at the moment when he intentionally struck the plaintiff and that he did it in order to protect himself. It is this nexus between law and fact that leads lawyers to talk, frequently, about "proving that there was a battery". It is a shorthand way of saying "proving facts that will bring the plaintiff's claim within the definition of a battery". Unless one understands this, the use of the shorthand can be misleading.

Lawyers often talk, too, about "proving negligence" as though negligence were a fact like any other. But this is similarly misleading: To be sure, in proving particulars of negligence, such as high speed and lack of attention in a motor vehicle case, or the failure to do a sponge count or use sponges with strings attached in a surgical malpractice case, one is proving facts. But the ultimate conclusions that these particulars constitute negligence involves a value judgment. The conduct proved to have taken place is measured against a community standard or norm - as represented by the behaviour of the "reasonable man" in like circumstances - and is adjudged to be negligent if it

falls below the standard. One should properly talk, therefore, of "proving facts which will lead to a finding of negligence". One's perception of the legal meaning of negligence will shape one's decision as to the important facts or particulars.

More particularly this chapter is concerned with "the proof of negligence".

METROPOLITAN RAILWAY COMPANY v. JACKSON

House of Lords.(1877) 3 App. Cas. 193

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case an action was brought by the Respondent against the *Metropolitan Railway Company* for negligence in not carrying the Respondent safely as a passenger on the railway, and for injuring his thumb by the act of one of the Appellants' servants in suddenly and violently closing the door of the railway carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord *Coleridge*, Mr. Justice *Brett*, and Mr. Justice *Grove*, were of opinion that there was such evidence. The Court of Appeal was equally divided; the Lord Chief Justice and Lord Justice of Appeal *Amphlett* holding that there was evidence, the Lord Chief Baron and Lord Justice of Appeal *Bramwell* holding that there was not.

The facts of the case are very short. The Respondent in the evening of the 18th of July, 1872, took a third-class ticket from *Moorgate Street* to *Westbourne Park*, and got into a third-class compartment; the compartment was gradually filled up, and when it left *King's Cross* all the seats were occupied. At *Gower Street Station* three persons got in and were obliged to stand up. There was no evidence to shew that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the Respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at *Gower Street*.

At *Portland Road*, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was no evidence to shew by whom either act was done. Just as the train was starting from *Portland Road* there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The Respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the Respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at that moment, by the door being slammed to, the Respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury found a verdict for the Respondent with £50 damages. There was not, at your Lordships' bar, any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been

CHAPTER IX: DAMAGES FOR PERSONAL INJURY AND DEATH: SURVIVAL OF ACTIONS

Personal injuries generate a variety of losses of a pecuniary or financial nature. Some writers call them economic losses, although this use of the term is initially puzzling to an economist. Hospital and medical expenses and loss of income are the most common. Where these losses are ascertained at the time of the trial or settlement of a personal injury action or claim they are compensated for under the heading of special damages. Sometimes, however, these damages cannot be fully determined at the time of the trial or settlement because, due to the lasting or permanent nature of the injury, they lie in some measure in the future. Because of the once-for-all damage award that is the common law norm, an effort must nevertheless be made to determine what they may be so that the judgment at trial or the settlement can finally conclude the issue. Prospective losses are sometimes referred to as general damages but this term is also used to apply to damages awarded in respect of harm which is not pecuniary or financial: pain and suffering, and the sense of loss that goes with a crippling or life shortening injury. The various heads of general damages have something in common; they cannot be readily ascertained. They are also markedly different, however. Future pecuniary loss cannot be ascertained because it has not yet occurred. Damages for non-pecuniary "losses" cannot be ascertained because they are not financial in nature, although some writers suggest that a market value could be attached to them. Consider, as you read through the cases and materials, the advantages and shortcomings of the common law approach to compensation for personal injury.

Sometimes, of course, personal injuries are fatal and those who survive the deceased suffer loss. Compare the attitude of the law towards the losses suffered by the survivors with its attitude towards injury compensation.

Fatal injuries are not always instantly fatal. Sometimes the victim survives for a shorter or longer period before succumbing. Then it can be said that the victim and those who survive him suffer loss. Should the claim of the victim, if it has not been dealt with before death, survive for the benefit of the estate? Should the claims against the victim also survive the death and be capable of being pursued against the estate? And finally, should both the victim and the victim's survivors have a right to compensation?

These are some of the obvious questions arising in this chapter. No doubt there are many others that will come to you.

(a) Damages for Personal Injuries

PHILLIPS v. SOUTH WESTERN RAILWAY COMPANY

Queen's Bench Division. (1879) 4 Q.B.D.406

COCKBURN, C.J. .....

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley* v. *London and North Western Ry. Co.* (1), an action brought on the 9 & 10 Vict. c. 93,